

ON EXPRESSIVE PUNISHMENT AND HOLISTIC DESERT

A Thesis

by

JACOB GREENBLUM

Submitted to the Office of Graduate Studies of
Texas A&M University
in partial fulfillment of the requirements for the degree of

MASTER OF ARTS

May 2008

Major Subject: Philosophy

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ABSTRACT

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Expressive theories of punishment incorporate both deontological and consequentialist components. The deontological element claims that punishment expresses the value of both victim and wrongdoer. The consequentialist element claims that punishment restores the victim's and wrongdoer's worth. In contemporary literature, however, it is unclear which component is given priority and therefore expressive theories appear ambiguous at best and inconsistent at worst. My thesis argues that expressive theories are cleared up and made consistent through employing a holistic notion of punitive desert. Holism is the view that accurate desert judgments must reference an actually obtaining just distribution of punishment. In my view, the expressive function is feasible only when desert is understood holistically and in this sense expressive theories are committed to giving priority to the deontological component.

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CHAPTER I

INTRODUCTION

Expressive theories of punishment are unique insofar as they attempt to fuse classic retributive and deontological premises like the desert and “respect for criminal” theses, or the combined view that treating criminals in accordance with their deserts respects their agency and thus satisfies the moral demand to be just, to the consequentialist premise that at least part of punishment’s justification lies in its ability to publicly condemn crime. At first sight, this set of premises seems at odds. How can punishment’s justification include both retributive and consequentialist components? Doesn’t one obviously take precedence over the other? My thesis argues that when understood holistically (i.e., when desert presumes and references justice), expressive punitive theories are consistent and extremely compelling. Alternatively put, I argue against the traditional conception of desert that posits desert prejusticially (or prior to justice and without reference to justice) and in favor of desert understood as a distributive concept.¹

In Chapter II I argue that the best worked out contemporary version of expressivist theories - Jean Hampton’s retributive theory - is ultimately unjustifiable. For Hampton, the aim of retribution is to restore victims through expressing their equality. Unfortunately, however, Hampton’s argument does not explain why retribution is uniquely suited to do this. In developing my criticism, I employ Joel Feinberg’s distinction between comparative and noncomparative justice. Comparative justice involves comparing at least two persons in determining what each deserves. By contrast,

This thesis follows the style of *Journal of Social Philosophy*.

¹ By distributive justice I mean a version of comparative justice, see Chapter IV.

noncomparative justice corresponds to the claims of specific persons irrespective of others' claims. I show that Hampton's justification of punishment is premised merely on correcting comparative inequalities rather than noncomparative inequalities. Insofar as restoring the victim is a response to noncomparative wrongs, I contend (1) that Hampton lacks an argument for how retribution responds to noncomparative injustices and therefore (2) that the noncomparative motivation behind Hampton's theory is insufficient to justify retribution.

I turn to Hegel in Chapter III because his theory of punishment is, like Hampton's, expressive and egalitarian-inspired, however, unlike Hampton, Hegel employs a non-traditional desert thesis. The traditional usage of desert is prejudicial: desert is posited outside of and prior to justice. I argue, however, that Hegel employs desert as a legitimate moral concept only after just social conditions obtain. Furthermore, I argue that Hegel's notion of desert shares the same moral structure as the just social conditions. Because just social conditions endorse taking "particularities" seriously (e.g., intentions and consequences), desert, for Hegel, reconciles deontological and consequentialist intuitions. Thus, in contradistinction to many commentators who view Hegel (along with Kant) as an archetypal traditional retributivist, I maintain that Hegel's nuanced conception of desert makes his retributivism extremely non-traditional: Hegel does not think punishment (let alone proportionate punishment) is always required even with respect to crimes ordinarily regarded as serious.

In Chapter IV I examine in further detail the relationship between justice and desert. First, I look at Samuel Scheffler's work on holism. Holism reverses the

traditional claim that justice consists in treating people in accordance with their deserts. Instead, Scheffler argues, desert becomes a legitimate moral concept only after just distributions obtain and only when desert references this distribution. So far, however, holist scholars have limited their attention to cases of economic desert. Second, and in contrast to Scheffler, I argue that punitive desert can and should be understood along holist principles. My argument pulls features from the previous two chapters. For instance, I argue that despite Hampton's faults, her theory helps explain why desert claims are legitimate (i.e., can express what they are intended to express) only when they reference shared and just social distributions of punishment. I then argue that implicit in Hegel's punitive theory is the holistic principle that desert's legitimacy not only hinges on just social institutions (as we see in Chapter III) but that it also hinges on referencing a legal code and its corresponding punitive distribution which all properly educated citizens are expected to endorse.

CHAPTER II

EQUALITY AND DIGNITY IN HAMPTON'S RETRIBUTIVE THEORY

A. Introduction

Joel Feinberg defines punishment in terms of (1) the infliction of hard treatment and (2) the reprobative symbolism expressed through hard treatment. Indeed, what distinguishes punishment from mere penalties is that punishment includes this latter element.² When considering punishment's justification, however, Feinberg skeptically claims the "problem of justifying punishment, when it takes this [hard] form, may really be that of justifying our particular symbols of infamy."³ That is, because the reprobative function is distinct from hard treatment and seems to be what we really value in punishing, the problem of punishment's justification reduces to defending the expression of moral disapproval via punishment as opposed to non-punitive methods.

In response to Feinberg's observation, Jean Hampton attempts to justify retributive punishment by arguing that punishment is uniquely suited to reassert victims' worth.⁴ We are required to reassert victims' worth because wrongdoers deny their worth. Hampton argues that insofar as we hold egalitarian commitments, we must proportionately punish wrongdoers because punishment concretely reverses the unequal

² Joel Feinberg, "The Expressive Function of Punishment," in *Doing and Deserving* (Princeton: Princeton University Press, 1970), 95-118, at 95 and 98.

³ *Ibid.*, 116.

⁴ In Hampton's later work, she actually claims certain non-punitive methods can reassert victims' worth, that is, perform the retributive function. This chapter lacks discussion of this because my argument does not hinge on Hampton's nuanced distinction between punitive and non-punitive retribution. Hence, I simply discuss Hampton's retributivism according to its usual interpretation, as a theory of punishment. For Hampton's mention of non-punitive retributivism, see "Correcting Harms Versus Righting Wrongs: The Goal of Retribution" *UCLA Law Review* 39 (1992): 1659-1702, at 1684, 1697-98.

relationship between wrongdoer and victim, which the wrongdoer's action creates. Thus, punishment is justified because it accomplishes the good of reestablishing equal moral respect.

In this chapter I argue against Hampton's retributive theory. In developing my argument, I draw upon Feinberg's distinction between comparative and noncomparative justice.⁵ Comparative justice involves comparative equality between at least two persons. Noncomparative justice involves giving each person his or her due irrespective of others' claims. I maintain Hampton employs both conceptions. She wants to assert both that victim and wrongdoer are equally morally worthy and that they have the high degree of value known as "dignity." Yet, I contend Hampton only provides an argument for the former. This is problematic because Hampton's retributivism aims to restore victims' dignity, a noncomparative goal. Therefore, insofar as Hampton's theory is motivated by a claim for which she lacks an argument, I conclude her retributivism is unjustified.

B. Hampton's Theory: How to Properly Respond to Moral Injuries

Before turning to Hampton's theory proper, it behooves us to lay some necessary groundwork. In particular, it is crucial to highlight the difference between harms and wrongs. Harms are traditionally the subject of tort law and are identified with losses to persons' bodies, psychologies, and capacities and which "extend over everything we are

⁵ Joel Feinberg, "Noncomparative Justice," *The Philosophical Review* 83 (1974): 297-338.

prepared to consider to ‘belong’ to a person.”⁶ In tort law, harms often, although not necessarily, lack intentional connotations. Thus, the main focus when responding to harm is on the damages themselves rather than on the intention behind the harm. Therefore, harms are often corrected through tort law’s primary instrument, compensation.

Wrongs, by contrast, are precisely those actions that cannot be materially compensated even in principle and their corresponding legal domain is criminal law. Wrongs cannot be compensated because they are morally injurious and moral injuries deny persons’ intrinsic value. Because intrinsic value cannot be compared or exchanged, responding to them with compensatory analogues is deemed inappropriate.⁷ The conception of value Hampton assumes is the Kantian conception of human worth. On this view, persons cannot lose the intrinsic, equal worth they always have. This value generates persons’ rights. Nevertheless, Hampton maintains that it is not enough to say persons have this value (or rights), we must also protect this value when violated; indeed, saying something has intrinsic value means that it should be preserved and acknowledged in various ways.⁸ Thus, a wrong explicitly denies someone the protection to which her value entitles her and thereby implicitly denies her value.

One clear example of moral injury is rape. Rapists deny victims equal status through rape’s degrading messages. These messages are twofold. Rape (1) says the victim is a mere object through treating her as one and (2) claims the rapist occupies a

⁶ Hampton, “Correcting Harms Versus Righting Wrongs,” 1662.

⁷ Hampton, “Correcting Harms Versus Writing Harms,” 1666.

⁸ Ibid., 1684.

“higher position” relative to his victim. The rapist’s “treatment is intended to ‘mean’ (i.e., to be evidence of) his superiority.”⁹ By “higher position” Hampton means that rape elevates the rapist’s moral status relative to his victim. He can do to her what she cannot do to him. Of course, the two parties do not actually occupy different moral positions, according to the Kantian theory. However, the rapist’s treatment misrepresents his victim’s value through disrespecting her rights. He treats her as someone who lacks (full) rights. Similarly, the rapist misrepresents his value through exempting himself from the normative requirements constitutive of moral life. These representations are “objective” insofar as they are indexed to the “members of the cultural community” who “appropriately understand” the injury’s messages.¹⁰ Thus, moral injuries exist independently of whether injured persons recognize their status as victims (presuming members of the community understand the message).¹¹ The rape victim who lacks a feeling of self-worth and is thereby disabled from recognizing her rape as wrong is nevertheless, according to rape’s objective meaning, a morally injured person. Likewise, the rapist who lacks the moral awareness that his message indicates his (false) superiority is, nevertheless, a moral injurer.

According to Hampton, retribution is the proper moral response to wrongs. As has been noted, wrongs deny victims’ value and ascribe more value to wrongdoers; in this sense they are false messages because they deny the true value the Kantian theory ascribes to persons. Retribution is the appropriate response because it corrects such false

⁹ Ibid., 1677. This quote is taken from Hampton’s discussion of a murderous farmer, however, it applies equally to her discussion of rape.

¹⁰ Hampton, “Correcting Harms Versus Writing Harms,” 1670.

¹¹ Ibid., 1671.

claims though vindicating the victim. Punishment vindicates when it (1) re-establishes “the acknowledgement of the victim’s worth” and (2) repairs “the damage done to the victim’s ability to realize her value.”¹² Punishment re-establishes acknowledgment through its communicative function of reasserting the victim’s value. This function makes all the relevant parties (and societal members) acknowledge the victim’s worth. It unambiguously communicates to everyone that denials of persons’ worth demand serious repercussions. Punishment’s reparative function works in a different way. It denies, “what the wrongdoer’s events have attempted to establish”¹³ by lowering the wrongdoer at the hands of the victim (represented by the state).¹⁴ This act of lowering repairs the damage to the victim’s ability to realize her value through partially expelling (e.g., via incarceration) the wrongdoer from the moral community.¹⁵ This expulsion repairs in a weak sense by disabling (e.g., through incarceration) the wrongdoer from wronging, but it also repairs in a strong sense by upholding the victim’s rights. She, like her fellow persons, wields rights that carry power. She is repaired in this strong sense by being made legitimately powerful. Thus, she (through the state) punishes and then “the score is even.”¹⁶ Because the wrongdoer (and those who share his inegalitarian commitments) must be made to obey law and because responding to wrongs is not morally optional, punishment is characterized as an instrument that “strikes back”¹⁷ in

¹² Hampton, “Correcting Harms Versus Writing Wrongs,” 1686.

¹³ Ibid., 1686-87.

¹⁴ Jean Hampton, “The Retributive Idea” in Jean Hampton and Jeffrie Murphy, *Forgiveness and Mercy* (New York: Cambridge, 1988) at 126.

¹⁵ Wrongdoers cannot be totally expelled because this would violate the Kantian theory of human worth.

¹⁶ Hampton, “The Retributive Idea,” 128.

¹⁷ Ibid., 123.

defense of the victim's value and confirms the two parties "as equal by virtue of their humanity."¹⁸

Punishment, in other words, has a *telos*.¹⁹ This marks one of Hampton's core departures from traditional retributive theory and deserves some mention. According to many traditional retributivists, retribution is a bedrock moral intuition. In many retributive theories, this intuition is linked to the concept of desert: the judgment that wrongdoers deserve punishment is supposed to be sufficient to inflict just punishment. On this traditional view, just punishment is completely backward looking; proportionately responding to past wrongs guarantees justice. Hampton's problem with this concept of retributive justice is that it ignores victims by only taking wrongdoers into account. Because the traditional view does not take victims seriously, it is unmoored from our egalitarian commitments, which we use to read the messages implicit in wrongs. According to Hampton, insofar as retribution is distinct from these commitments, it is not sufficiently just because it fails to highlight what makes wrongdoings wrong: the denial of the victim's value and the subsequent (albeit false) increase in the wrongdoer's status. At best, retribution of the merely backward-looking variety is legalized revenge.

Hampton attempts to correct the problems with traditional retributive theory by tying desert judgments to the relationship between victims and wrongdoers and explains why her theory is wedded to the retributive idea (albeit, of a non-traditional type). If one overlooks this relationship between the two parties and punishment and instead focuses

¹⁸ Hampton, "Correcting Harms Versus Righting Wrongs," 1686.

¹⁹ Hampton, "The Retributive Idea," 123.

only on Hampton's claim that punishment "denies what the wrongdoer's events have attempted to establish,"²⁰ one might wonder why punishment is required (or even uniquely suited) to correct the false claims implicit in wrongs. Clearly, one might think, the state could issue a public statement saying the wrongdoer is wrong and that in fact he and his victim are equal. If other media than punishment can accomplish this reaffirmation, why is punishment considered the privileged, or even a permissible, means of doing so? Perhaps, as noted in the introduction, the "problem of justifying punishment, when it takes this [hard] form, may really be that of justifying our particular symbols of infamy."²¹ But, shouldn't we pick another medium that is less prone to errors of measurement or at least less expensive? In other words, insofar as other non-punitive modes are capable of reaffirming the victim's worth, does the retributivist position simply reduce to the intuition (unsubstantiated by empirical evidence or philosophical argument) that retribution *feels* like it best accomplishes this reaffirmation?

Hampton's victim-focused retributivism attempts to avoid this reduction. Recall that for Hampton, part of what makes moral injuries wrong is their (false) elevation of the wrongdoer through the lowering of the victim. Also recall that wrongdoers who commit more serious wrongs are that much further removed from their victims.²² So Hampton presents us with a picture where wrongdoing creates degrees of (false) moral difference between the two parties. Now consider Hampton's claim that punishment restores equality between the two parties. It does so because punishment lowers the

²⁰ Hampton, "Correcting Harms Versus Righting Wrongs," 1686-87.

²¹ Feinberg, "The Expressive Function of Punishment," 116.

²² Hampton, "Correcting Harms Versus Righting Wrongs," 1690.

wrongdoer at the hands of the victim (represented by the state).²³ Therefore just punishment requires proportionality because two parties are being restored.²⁴ Because the two parties are on a proportionally unequal standing, only reversing the proportional difference will substantively restore the equality between them.²⁵ By contrast, non-proportional responses cannot restore equality and are therefore insufficient. For instance, it is insufficient for a judge to merely announce a wrongdoer's guilt. After all, a wrongdoer's action "did not just 'say' [his victims] were worthless relative to him, but also sought to make them" worthless.²⁶ Mere announcements bear no weight on the moral gulf between the wrongdoer and victim. The difference between the parties is not born of mere words²⁷ and therefore a purely verbal response cannot "do" anything to counter this difference.²⁸ Contrary to traditional retributivists' attempt to justify proportionate punishment through an abstract desert thesis that states a wrong of a particular type intrinsically calls for a punishment of a particular severity, Hampton justifies punishment through the fact that it concretely cancels (through reversing) the

²³ Hampton, "The Retributive Idea," 126.

²⁴ I return to this idea later in the chapter. I argue that proportionality presupposes a comparison between at least two people. Therefore, if no comparison is made, no call for proportionality can be made.

²⁵ Which of course excludes the principle *lex talionis* or "eye for an eye." Some punishments can be proportionate in this strict sense, however, others certainly cannot. For example, torturing a torturer is morally prohibited. Strict application of this principle would violate Hampton's Kantian ethics and she repeatedly distances herself from it.

²⁶ Hampton, "The Retributive Idea," 126.

²⁷ Worth noting is the tension between Hampton's Kantianism and her punitive argument. That is, if the victim and wrongdoer's worth do not actually change, then it's unclear why physical punishment is the appropriate response. In other words, it is puzzling why punishment, a physical medium (as opposed to a verbal medium), can respond to the non-actual change in the victim and wrongdoer's worth. Daniel Farnham, a defender of Hampton, resolves this tension by emphasizing Hampton's view on conventions. I discuss Farnham's defense in the next section.

²⁸ Hampton, "Correcting Harms Versus Righting Wrongs," 1686.

inequality between the two parties.²⁹ Indeed, it is through proportionate punishment's concrete message that the concept of it "striking back" for the victim's value is most resonant.³⁰ Through striking back, retribution restores equality.

C. Critics and Defenders

So far we have encountered two very different features of Hampton's theory, messages and concrete acts (a distinction she never explicitly states). It is unclear though whether Hampton is mostly concerned with messages, both the wrong's immoral message as well as punishment's moral counter-message, or with real change in the world, both the real change the wrong produces as well as the real change punishment re-establishes. The following problem thus comes to light: Punishment's function depends on which facet one emphasizes, however, it is uncertain which facet Hampton emphasizes more, messages or real changes. Recent discussion of Hampton's theory comprises a debate between critics who interpret her "epistemologically," that is, according to her stress on messages, and her defenders who interpret her "metaphysically," that is, according to her stress on real concrete change.³¹ Here I briefly outline the contours of this debate.

First, then, the epistemological view. David Dolinko argues that Hampton's justification of punishment justifies too much. Recall that for Hampton the point of punishment is to nullify false moral claims. Dolinko's criticism takes its point of

²⁹ Again, the traditional retributivist notion of a wrong is not relational. For Hampton, the wrong includes its establishment of a proportionately unequal relationship. The wrongdoer's elevation pivots on his victim's lower status.

³⁰ Hampton, "The Retributive Idea," 123.

³¹ These terms are principally employed by the supporter, Daniel E. Farnham. See, Daniel E. Farnham, "A Hegelian Theory of Retribution," 1-20. Unpublished. Cited with approval from author.

departure from Hampton's epistemological claim that wrongdoing creates false moral beliefs. In response to this claim, Dolinko asks, "Why should we care about nullifying those false moral claims?...After all, we certainly do not believe that it is imperative to set up a social or governmental mechanism to seek out and correct false moral claims in general."³² For instance, Hampton's theory seems to justify throwing people in jail for things like publishing racist or sexist books. Hampton's theory then has the negative effect of justifying curtailments of free speech, which most of us find absurd.

Heather Gert, Michael Hand, and Linda Radzik offer another epistemological criticism.³³ They dispute Hampton's assertion that punishment denies the wrongdoer's false claim and sends back the true message expressing the victim's and wrongdoer's equality. Hence, their view is epistemological because it deals with the messages, intended for and affecting others' beliefs, implicit in punishment and wrongs. Hampton's argument that punishment provides the correct evidence of equality fails in two ways. (1) It presumes the victim's initial defeat provides evidence of her moral inferiority. This presumption is surely incorrect though. The victim's defeat only signifies the wrongdoer's greater ability to coerce. Similarly, (2) Gert, et al. contend Hampton's argument for punishment confirms this false conflation of coercive power with moral value, since both moral injuries and punishment provide moral evidence in the same way. That is, because proportionate punishment, like moral injury, gives evidence of the victim's value, Hampton's argument for punishment works only if she "accepts the

³² David Dolinko, "Thoughts about Retributivism." *Ethics* 101 (1991): 537-559, at 551.

³³ Heather Gert, Michael Hand, and Linda Radzik, "Hampton on the Expressive Power of Punishment." *Journal of Social Philosophy*. Vol. 35 No1, 2004, 79-90.

offensive premise that the demonstration of coercive power provides evidence of moral value.”³⁴ Hampton’s argument, then, hinges on a premise most of us find absurd.

Because we are surely unconvinced that a moral injury gives evidence of a victim’s moral inferiority, a theory of proportionate punishment seems to reinforce rather than correct false moral views.³⁵

Gert, et al. next consider a hypothetical counter-objection. Perhaps Hampton might argue that Gert, et al. misunderstand her. Of course, there is no “natural” semantic connection between coercive power and moral value, but it is a living and forceful convention and we therefore cannot ignore it. Instead, we must harness this convention with our egalitarian aims in mind.³⁶ Gert, et al. maintain this counter objection fails to justify punishment for two reasons. It fails (1) because if the message in coercive action is merely conventional, punishment merely reinforces the bad convention equating power with moral worth. Therefore, rather than call forth punishment, wrongdoing calls forth the need “to teach people to reject this convention.”³⁷ This counter objection also fails (2) insofar as it cannot explain why punishment is uniquely suited to convey the equalizing message. “The fact that we *can* send the necessary message [of equality] by inflicting harm is not a justification for doing so.”³⁸

Daniel Farnham admits Hampton’s theory is flawed when considered from its epistemological standpoint, however, he defends Hampton by focusing on her

³⁴ Gert, et al., “Hampton on the Expressive Power of Punishment,” 86.

³⁵ Ibid., 86.

³⁶ Ibid., 86.

³⁷ Ibid., 86.

³⁸ Ibid., 87.

“metaphysical” thesis, a component of her theory he claims Gert, et al. ignore.³⁹ Citing the case of rape in the explication of this thesis, Farnham says,

The violator in this case has not just given evidence for a view about human worth, he has made something the case in the world...In doing so, this wrongful action creates a state of affairs where the wrongdoer is elevated above the victim. That is a relational feature between the two people that supervenes on the conventions expressing these relations...A person who has been wronged has not just had false things about her *expressed*, she has been *injured*.⁴⁰

Therefore, a rape victim is not merely represented to society as less worthy than she in fact is. She is also made to live in fear and often shame. Similarly, the rapist does not merely represent his greater status through his action. He also makes himself more powerful by coercing those beneath him. Thus, the metaphysical interpretation claims that wrongs reshape our moral world as opposed to merely representing victims and wrongdoers inaccurately.⁴¹ This is not to deny, of course, the conventional nature of the specific means used in many cases of moral injury. However, wrongful acts often “involve conventions so deep that they are constitutive of human society, and may be regarded as natural in that sense.”⁴² Similarly, the ways humans respond to wrongs are conventional. Responding to a rapist by merely alerting the community that his evidence of superiority is incorrect (Gert, et al.’s suggestion) is to disregard the fact that life is governed by conventions which carry normative force. In the case of rape, our

³⁹ Farnham, “A Hegelian Theory of Retribution”, 4. He later switches to calling the metaphysical component “Hegelian.”

⁴⁰ Ibid., 7.

⁴¹ On this point Farnham bends Hampton’s position in a Hegelian direction. Recall, Hampton’s Kantianism commits her to the view that all persons have equal worth no matter how they are mistreated. Of course, then it is unclear why punishment restores right. Farnham resolves this problem by invoking Hegel’s idea “of the need to give our abstract ideas (such as autonomy or right) concrete expression through the use of social conventions...We need to do this because we are not primarily debaters about what is true, we are primarily embodied agents.” See Farnham, “A Hegelian Theory of Retribution,” 8.

⁴² Farnham, “A Hegelian Theory of Retribution”, 9.

convention of disapproval is not captured via the static message of formal memoranda. Words alone cannot remake the moral world. Therefore, responding to a rapist in this merely communicative way is, according to our deep conventions, wrong. Punishment is meant to reshape the moral world once again in order to establish equality. “When a person has been wronged by another, the most relevant feature of the person wronged is the relation that obtains between her and her wrongdoer.”⁴³ Proportional retribution repairs this relation. When the state, acting on the victim’s behalf, lowers the wrongdoer before the victim, “the wrongdoer has something done *to* him.”⁴⁴ Moral reality is restored because the victim’s agency (or value) is realized.

Farnham’s defense then supposedly saves Hampton’s theory from Dolinko’s and Gert, et al.’s objections. By focusing on the metaphysical view, Farnham addresses four points: (1) The metaphysical view escapes Dolinko’s contention regarding free speech. Punishment does not have to respond to all false moral claims, only those which substantively reshape our moral world. Because publishing false moral views does not directly reshape our moral world, punishment is not required to correct these views.⁴⁵ (2) Punishment’s conventional nature quells Gert, et al.’s worry that punishment supports immoral evidence through equating power with moral value. We simply do not understand punishment as upholding this equation.⁴⁶ Instead, we conventionally

⁴³ “A Hegelian Theory of Retribution”, 13.

⁴⁴ Ibid., 12.

⁴⁵ Of course, false moral claims can and often do reshape our moral world in significant ways, like when racist literature encourages racist attacks or instills general racist attitudes, however, I think Farnham would maintain that such claims are fundamentally representations and therefore less morally worrisome than the attacks and attitudes they promote.

⁴⁶ Gert, et al. interpret Hampton according to the Gricean theory of natural meaning. Gert, et al., “Hampton on the Expressive Power of Punishment,” 86.

understand punishment as restoring the moral world. Because this convention is so deep, it seems impossible to give up on pain of dramatically changing our moral landscape. (3) Retributive punishment is uniquely suited to restore moral equality because only it actually lowers the wrongdoer. By contrast, mere announcements cannot address the real inequality between victim and wrongdoer and are thus incapable of restoring moral equality. (4) Retribution, Farnham concludes, is morally justified because its egalitarian motivations and accomplishments are moral.

D. Objections to Hampton

As we saw above, Farnham's metaphysical interpretation presumes punishment does major re-shaping work. Similarly, Gert et al.'s epistemological interpretation presumes punishment offers counter-evidence (although they think such evidence is spurious). In the following analysis, I examine these functions. In doing so, I employ Joel Feinberg's distinction between two general conceptions of justice, comparative and noncomparative. Employing this schema is fruitful because it allows us to zero in on conceptual assumptions implicit in Hampton's theory. In analyzing these assumptions, I argue Hampton conflates comparative and noncomparative principles, thus ultimately making her retributivism unsatisfactory. I also argue that insofar as the debate between the critics and Farnham ignores this schema, Farnham's rebuttal falls short of exonerating Hampton's faults.

Comparative justice, Feinberg notes, involves “equality in the treatment accorded all the members of a class.”⁴⁷ Conversely, comparative injustice consists in departing “from the requisite form of equal treatment without good reason.”⁴⁸ Prizes exemplify events defined by their use of comparative principles because the relevant form of equal treatment consists in giving each contestant their fair hearing and judging each according to the same rules of the competition. The aim of this fair hearing and the idea of the contest generally speaking, however, is the purpose of selecting the best X or “the exact ranking of contestants against one another.”⁴⁹ Thus, when dealing with prizes, for instance, pie-baking contests, it is impossible to determine who deserves the blue ribbon without tasting the pies of the other bakers.⁵⁰ Indeed all forms of comparative justice involve this principle of consulting the claims or merits of others.

Noncomparative justice, by contrast, does not include the principle of consultation.⁵¹ For instance, in the case of grades, a person’s “rights-or-deserts alone determine what is due him.”⁵² When doing noncomparative justice to large groups of people, “we do not compare them with each other, but rather we compare each in turn

⁴⁷ Joel Feinberg, “Noncomparative Justice,” 299.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid., 205. Feinberg goes on to discuss how contests can include noncomparative elements, however, he represents contests like the pie-baking variety as the iconic comparative judgment.

⁵¹ Another relevant noncomparative paradigm Feinberg notes is retributive punishment. However, Feinberg’s use of the term retributive punishment bears no mention of proportionate punishment. I presume he uses the term to designate the belief that wrongdoers’ desert is a sufficient condition for just punishment. See page 301.

⁵² Feinberg, “Noncomparative Justice,” 300. Later, on page 306, Feinberg also says grades can include comparative principles, for instance, when grading on a curve. Nevertheless Feinberg maintains that grades are a classic example of noncomparative judgments.

with an objective standard and judge each (as we say) ‘on his merits.’”⁵³ Thus, noncomparative justice supplies tools to criticize cases which comparative justice cannot provide; e.g., noncomparative justice finds cases where *all* persons are treated poorly as nevertheless morally unacceptable.

Clearly, however, our world is not so clear-cut as to have two wholly non-overlapping types of justice. The case of exploitation makes this evident. Let’s say we happen to come across an exploited person, for example, a slave. Here is someone whose actions have not merited his demeaning treatment (as in fact none of his actions could). Also, assuming a Kantian view of personhood, his rights are clearly violated. In justifying our judgment that he is exploited, we cite premises that concern only this particular slave and an objective moral standard denied him. Thus, we employ noncomparative principles. However, our moral outrage at the slave’s treatment probably exceeds the case thus described. This is because the target of our moral outrage includes the slave’s relationship to his master and is directed at his master. Here we are angry because “a comparison is made between the resultant condition of the exploiter and that of his victim” and this comparison is surely unjust.⁵⁴ Thus, comparative and noncomparative principles can operate in tandem. If we are as careful in analyzing other cases as we have been in this, we can parse apart the relevant moral principles in an effort to better determine how to express our moral responses.

This is exactly what Hampton does not do. To see how we must recall what Hampton claims moral injurers say. (1) They implicitly claim their victims are not so

⁵³ Joel Feinberg. “Noncomparative Justice,” 300.

⁵⁴ Ibid, 301.

valuable that their value precludes such treatment and (2) they implicitly say they are worth more than their victims. With our Feinbergian schema in hand, we now see that (1) is judgment of noncomparatively injustice because it makes no reference to persons besides the victim while (2) is a judgment of comparative injustice because it references a relationship between two persons. Recall also that for Hampton, punishment is the proper response to moral injury because it reasserts the victim's worth and denies the wrongdoer's false claim. Indeed, punishment is justified insofar as it is uniquely suited to respond in these ways. However, these ways of responding – reasserting a positive value and denying comparative disvalue– are two very different things. Reassertion responds to noncomparative wrongs, while denial responds to comparative wrongs. So what do we make of Hampton's claim that punishment is the wrongdoer's defeat at the hands of the victim? That is, it seems clear that the idea of punishment as defeat responds to comparative wrongs because it explicitly refers to the victim and wrongdoer. It is less patent, however, whether defeat responds to noncomparative wrongs (through reassertion), and, if it does, we must assess if defeat guarantees reassertion. Recall, it is necessary for defeat to guarantee reasserting noncomparative wrongs because reassertion is part of Hampton's own criteria for punishment's justification. Hence, Hampton needs an argument explaining why retributive punishment, which apparently answers comparative wrongs, also answers noncomparative wrongs.

If defeat counters noncomparative wrongs it seems to do so only by default. That is, it is conceptually plausible that defeat broadcasts the victim's value insofar as she is "raised," however, its primary purpose is responding to comparative wrongs. Answering

noncomparative wrongs via reassertion is its secondary purpose because reassertion is distinct from defeat. So defeat appears justified because it can, as it were, kill two birds with one stone: first through responding to comparative wrongs, and second through responding to noncomparative wrongs. However, this secondary function that Hampton ascribes to defeat – its ability to counter noncomparative wrongs – disrupts the coherence in Hampton’s retributivism. To illustrate, consider the following example.⁵⁵ Two inexperienced tennis players, Ann and Bea, play each other in a match and Ann wins. What has Ann accomplished? Certainly Ann has satisfied certain criteria (namely, winning) indicating her status as a comparatively better player. However, Ann has probably accomplished little more than this because Ann is, after all, an inexperienced player. Ann’s victory does not *reveal* her to be a good player. Therefore, comparatively Ann seems better and yet noncomparatively she still seems bad. Hampton’s theory of retribution works the same way. Proportionate punishment comparatively defeats the wrongdoer and avows the victim’s worth, relative to the offender, however, it is uncertain if it addresses the noncomparative value of victims. Of course, a victim’s worth *could* be noncomparatively reasserted via punishment if, for instance, it reminds her and others that she possesses inalienable dignity. But what reason is there to think punishment invariably reminds in this way? It appears highly unlikely that punishment reveals victims’ inalienable worth simply because wrongs seem to provide such strong evidence that victims lack worth, both to victims themselves and to their communities. Because of this lack of guarantee, the coherence of Hampton’s view is strained. Hampton’s theory

⁵⁵ Linda Radzik pointed out this useful example to me.

of punishment wants to assert the victim's value, however, she provides no argument for how punishment is linked to this noncomparative assertion and in light of the facts just discussed, it appears doubtful such an argument could be given.

Hampton has two options. She can (1) admit her retributivism is justified on only comparative principles, which reverse or deny the wrongdoer's proportionately higher status and his victim's proportionately lower status. This move is problematic, though, because the comparative principles animating punishment are not solely victim-focused. As we have seen, reasserting is at best proportionate punishment's secondary function. Hence, comparative principles seem incapable of accounting for Hampton's retributive motivation, namely, victim reassertion, which is noncomparative. Perhaps Hampton might then (2) amend her retributivism to include only noncomparative principles. Hence, Hampton's theory would fall back on the traditional retributive desert thesis, which claims accurate punitive judgments are based solely off the wrongdoer's noncomparative desert. It is unclear though how retribution of this sort could reassert the victim's worth because the retributive desert thesis does not reference victims. Hampton then cannot legitimately aver that punishment is sufficient to justify punishment's unique reassertion function. Therefore, we can say relevant non-punitive mediums might perform the reassertion function better than punishment. Perhaps giving victims a high-paying job or a vacation might better do the trick. In any case, nothing about noncomparative-based punishment per se would justify why it alone reasserts victims' value.

In my criticism thus far I have used the language of “reassertion” and “denial,” hardly the metaphysically robust terms employed in Farnham’s metaphysical interpretation. To avoid begging the question against Farnham by using the critics’ epistemological interpretation, I’ll use the metaphysical interpretation. Recall that on Farnham’s view punishment not only corrects false evidence, but also concretely reestablishes moral equality. By being lowered at the hands of the victim, “the wrongdoer has something done *to* him.”⁵⁶ And indeed, the wrongdoer has something done to him because the most relevant feature “of the person wronged is the relation that obtains between her and her wrongdoer,” which punishment concretely reverses.⁵⁷

It is worth pointing out that Farnham’s metaphysical interpretation assumes comparative premises: the victim *is* low while the wrongdoer *is* high in terms of their abilities to realize their value in the world. These premises require comparative responses making it the case that both parties realize their value equally so that moral reality is restored. Does this have any effect on my argument’s conclusion reached above?

Unfortunately, Farnham’s inclusion of metaphysical language helps his argument little because although it is plausible that punishment changes the comparative relation (by bringing the wrongdoer low), there is no reason to think punishment establishes the dignity of either party. That is, reversing the comparative inequality between the two parties could restore the victim, however, it by no means guarantees it because the metaphysical principles underlying punishment and those underlying making the victim

⁵⁶ Farnham, “A Hegelian Theory of Retribution,” 12.

⁵⁷ Ibid., 13.

a robust agent are simply not equivalent. To illustrate, consider the state employing a convention that claims punishment honors the victim of, let us say, a violent crime. What reason is there to think the victim is now no longer living in fear, no longer restricting her actions from fear? Is there any reason to think the victim is now living a free life? Similarly, consider the state's convention of incarcerating the criminal. How is he better off? How does living a severely restricted life enable him to become an equally valuable (as opposed to a superior) person? Conflating the two principles, as Farnham does, just begs the question. If restoring the victim is premised on comparative principles (which it is not), and proportionate punishment is the proper response to such principles, then restoring the victim means proportionately punishing. This is conceptually incorrect. The concept of restoring the victim is not wedded to proportionate punishment because it does not hinge on comparing the victim and wrongdoer. Rather, restoring the victim presupposes the judgment that she has been treated in a manner ill suited to her noncomparative value. It is a big jump indeed to presume this judgment is analytically tied to punishment. As we have seen, punishment, at best, restores the victim by default. Metaphysics, then, does not help Farnham's defense.

Perhaps though Farnham is on to something. Maybe Hampton's theory does contain a metaphysics. If there is such a metaphysics, however, it must surely be distinct from the comparative principles which underlie the critics' and Farnham's interpretations. The legitimacy of such comparative principles pivots on the assumption that reasonable persons will find proportionate punishment the best means of restoration and reversal. However, this is clearly a large and controversial assumption. Although

some persons may think wrongdoers should suffer for serious wrongs through severe punishment, certainly not all people do. By contrast, noncomparative judgments are less controversial. They take the form: Someone has been mistreated and we must see to treating her correctly (typically according to her inherent worth). Notice, this judgment is distinct from mandating proportionate punishment because it is victim-focused and does not reference the wrongdoer. The principles animating this noncomparative judgment run deeper than the comparative judgment. We care about people's rights, abilities, and well-being and not just how their rights, abilities, and well-being compare with those of other people. However, caring in the noncomparative way is also constitutive of moral life and certainly of the conception of human dignity Hampton endorses. By contrast, the comparative principles motivating proportionate punishment seem less constitutive.

E. Concluding Remarks

Despite the problems Hampton's retributivism encounters, she succeeds in a way traditional retributivists have not by linking proportionate punishment to our familiar intuitions about wrongs. This is a tactic ignored by traditional retributivists who usually attempt to justify punishment via the much-disputed non-comparative desert thesis. Instead, Hampton begins with the less contentious thesis that wrongs create (claim) comparative inequality. According to Hampton, punishment is justified because it re-establishes (reasserts) equality. Unfortunately, Hampton also believes but cannot explain that punishment restores (reasserts) victims' noncomparative worth. In the end, and

irrespective of which interpretation - epistemological or metaphysical - one applies, Hampton's employment of comparative principles fails to link retribution with its purported victim-focused motivation and end. It is sheer conjecture that punishment, which levels the playing field between victim and wrongdoer, also speaks to each party's noncomparative value.

CHAPTER III

HEGEL'S THEORY OF PUNISHMENT: THE SOCIAL CONDITIONS WHICH LEGITIMIZE NEGATIVE RETRIBUTIVISM

A. Introduction

In the last chapter we saw that Hampton implicitly relies on two notions of justice, comparative and noncomparative. I did not, however, explicitly mention two other implicit features of Hampton's theory: (1) her idea of desert is comparative in that how much punishment a criminal deserves is established by how "low" he brings his victim relative to his "raised" status. This comparative idea of desert is in stark contrast to the traditional view that regards punitive desert as a noncomparative concept. Yet despite Hampton's unique understanding of desert, she shares with the traditional view the idea (2) that justice consists in treating persons in accordance with their deserts.⁵⁸ In other words, according to the traditional view, desert is "prejusticial"; that is, desert is conceptually prior or exterior to justice.⁵⁹ Hampton's adherence to the prejusticial view is evinced when she justifies punishment as the practice that adequately responds to punitive desert claims.

Construed as a normative principle, the traditional definition of justice yields at least two distinct claims. Interpreted strictly, we have an obligation to punish. This view is positive retributivism, the theory that claims justice requires (1) treating criminals' in

⁵⁸ The traditional view of justice is discussed in Feinberg, "Noncomparative Justice," *The Philosophical Review* 83 (1974): 297-338, at 298. Feinberg says that punitive desert can be understood either comparatively or noncomparatively at 310-311.

⁵⁹ "Prejusticial" is Samuel Scheffler's term. See, "Distributive Justice and Economic Desert," in S. Olsaretti (ed.), *Desert and Justice* (Oxford: Clarendon Press, 2003) 69-92. It should also be noted that Hampton's use of comparative justice is also prejusticial.

accordance with their just deserts, which in turn demands (2) proportionately punishing criminals. When criminals are not treated in accordance with their deserts and proportionately punished, it is unjust. Therefore, insofar as we are morally required to be just, we are also required to punish criminals. If, on the other hand, we interpret the traditional definition less strictly, then our obligation consists in basing punishment's *permissibility* on desert claims. This view is negative retributivism: punishment is just only when inflicted on the deserving. This is not to say, however, that justice demands punishment (as the positive retributivist contends); other factors may outweigh our reasons to punish (e.g., costs or inability to deter future wrongdoers). Nevertheless, so long as those punished do deserve it, punishment is, at least minimally, just, and punishment in excess of desert is deemed unjust.⁶⁰ Hence, negative retributivism merely finds punishment permissible (insofar as it is deserved), not required. Again, though, what unites both forms of retributivism is their employment of prejusticial desert, which is understood as a legitimate moral principle prior to justice.

This chapter questions whether punishment's expressive function is inherently tied to prejusticial desert. In pursuing this question, I analyze Hegel's theory of punishment. Like Hampton, Hegel articulates the expressive function of punishment, employs a comparative notion of desert, and is usually read as employing the traditional prejusticial desert view. Specifically, Hegel is often read as a positive retributivist. Recently, however, Wolfgang Schild has argued against the positive retributivist

⁶⁰ Both types of retributivism actually share the notion of desert as an upper limit.

interpretation; instead, Schild reads Hegel as a negative retributivist.⁶¹ I contend that Schild's reading is problematic insofar as it yields a contradiction: Hegel appears to uphold both consequentialism and retributivism. Without departing from endorsing the negative retributivist line, I argue that avoiding this contradiction requires forgoing the traditional prejudicial definition of desert. Thus, I maintain that Hegel is a nontraditional negative retributivist. For Hegel, desert becomes a legitimate moral notion only *after* just social institutions are erected, but Hegel maintains his status as a negative retributivist insofar as punishment is deemed permissible via desert claims.

My argument focuses on Hegel's theory of freedom, something Schild ignores. Since Hegel never explicitly states my argument, and my argument presupposes moral features found throughout *The Philosophy of Right*, I examine how *The Philosophy of Right* works as whole. So rather than limit my focus to Hegel's overt discussions of punishment in the "Abstract Right" and "Ethical Life" sections, I analyze the kinds of freedom appropriate to these two sections.

The chapter proceeds as follows. First, I explain why commentators have traditionally regarded Hegel as a positive retributivist. These commentators base their reading on the "Abstract Right" section where Hegel indeed puts forth a positive retributive theory. Next, I look at Schild's argument that Hegel's emphasis on crime's

⁶¹ Wolfgang Schild, "The Contemporary Relevance of Hegel's Concept of Punishment," in *Hegel on Ethics and Politics*. Ed. Robert B. Pippin and Otfried Hoffe. (Cambridge: Cambridge University Press, 2004). I actually impute the "positive" and "negative" terminology to Schild. Although Schild refrains from this language, it is clear that he thinks Hegel is a negative retributivist. For the only other paper I'm aware of that argues Hegel is a negative retributivist (although it again does not use that term) see, Thom Brooks, "Is Hegel a Retributivist?" *The Bulletin of the Hegel Society of Great Britain* (2004): 113-126. I do not discuss Brooks's paper here because Schild covers most of Brook's points and his paper is better known.

effects makes him a negative retributivist. Finally, and against Schild, I argue that Hegel's endorsement of negative retributivism is premised upon rejecting prejudicial desert (not crime's effects), a claim I establish through examining the structure of *The Philosophy of Right* and Hegelian freedom.

B. Hegel's Positive Retributivism

Understanding Hegel's punitive theory as a retributive theory first requires glossing what he means by the term 'right' (*Recht*). In §1 Hegel states, "The subject-matter of *the philosophical science of right* is the *Idea of right* – the concept of right and its actualization." Hegel tells us the concept of right is freedom and right's actualization is "any existence [*Dasein*] in general which is the *existence of the free will*" (§29).⁶² When Hegel refers to right, he usually means right in this second sense - the actual existence of freedom. "Existence" for Hegel, Allen Wood notes, designates "something objective, something 'immediately external' to the will."⁶³ Therefore right refers to an external thing, but not a mere object; it designates a thing (our thing) through which our free will is free (or "with itself"). Notice, then, Hegel's use of the term right (*Recht*) is quite different from the way we (as in we English-speaking philosophers and people generally) typically use the term. As Wood states, "Normally, we do not refer to a thing we own as a right, but say instead that we have a right to it, meaning at least that we do

⁶² G.W.F. Hegel, *The Philosophy of Right*, translated by H.B. Nisbet and edited by Allen Wood (Cambridge: Cambridge University Press, 1991). It should be noted that when I quote the section number in the body of the paper I will, in standard fashion, also include an "A" or "R" after the section number if I am quoting an addition or a remark.

⁶³ Allen Wood, *Hegel's Ethical Thought*. (Cambridge: Cambridge University Press, 1990.), at 72. Wood references §26 here.

nothing contrary to obligation in using it as we see fit, and perhaps also that we have valid claims against others with regard to its use.”⁶⁴ By contrast, Hegel’s use of right signifies a more comprehensive notion of freedom; it includes (as we shall see) not just what we mean by formal or legal rights, but also the subjective and objective conditions necessary for freedom. For now though, we let the term designate a freedom-imbued object.

Hegel’s turn to crime and punishment pivots on his idea of right. Crime, he says, is the intentional violation of another’s right (§95). Given our above definition of right, we see that insofar as crime explicitly coerces a person’s external embodiment of freedom, his property which includes his body and well-being, it also implicitly denies his concept as a free being, someone with a “capacity for rights” (ibid). That is, because man expresses his freedom through infusing his will in objects (property), actions that intentionally deny a person his legitimate use of property in effect deny his freedom. Nevertheless, Hegel labels the criminal will “null” because its intention to deny (the concept of) freedom inevitably fails because freedom “which has no external existence... is to that extent invulnerable” (§§97-99). Instead, criminal actions (the criminal will’s external embodiment) merely harm freedom’s external embodiment, property.

Punishment, Hegel says, “cancels” the infringement. Here, one might be tempted to think that Hegel bizarrely treats punishment as an instrument that erases crime. Yet how can punishment erase or undo something that has already happened? But, Hegel

⁶⁴ Wood, 72.

does not equate “cancel” with “erase.” Instead, we can infer from our earlier discussion of right that punishment cancels in the sense of buttressing the forms (embodiments) of freedom which crime denies. So, for instance, through canceling the robber’s chance to hold his stolen goods (by taking away such goods and by incarcerating him for a specified time), punishment upholds the right to property. This kind of response is required because, as Hegel reminds us, “actual right” or freedom is a “mediated existence”; it requires external form in order to fully exist (§97). As strange as Hegel’s language of “mediated existence” is, his position is clearly in line with our intuitions regarding freedom. That is, we usually think it is not enough to say we have freedom, we must also enforce the ways we express our freedom, the ways we give freedom actual existence. Hegel’s notion of punishment jibes with this intuition. It is the instrument that enforces the norm banning coercion.

Still, we are far from retributivism proper. After all, Hegel has only told us punishment reaffirms the appropriate media freedom requires. He has yet to mention the following two traditional retributivist claims: (1) the desert thesis and (2) the proportionality thesis.

In §100 we find Hegel’s desert thesis:

The injury [*Verletzung*] which is inflicted on the criminal is not only just *in itself*...it is also a *right for the criminal himself*, that is, a right *posited* in his *existent* will, in his action. For it is implicit in his action, as that of a *rational* being, that it is universal in character, and that, by performing it, he has set up a law which he has recognized for himself in his action, and under which he may therefore be subsumed as under *his* right.

Hegel goes on to say: “In so far as the punishment which this entails is seen as embodying *the criminal’s own right*, the criminal is *honoured* as a rational being”

(§100R). Hegel claims the criminal is dishonored if he is “punished with a view to deterring or reforming him” since these aims are wholly exterior to his willed-action. That is, deterrence and reform derive their justification through appealing to the need to better control society. Individuals are thus viewed secondary to society and then only as wholly determined beings to be corrected through coercive professional management. Thus, deterrence and rehabilitation dishonor the criminal because they ignore the criminal’s will itself (his choice to commit the crime and its punitive consequences) (ibid).

Hegel’s proportionality thesis is in §101:

The cancellation [*Aufheben*] of crime is *retribution* in so far as the latter, by its concept, is an infringement of an infringement...But this identity [of crime and retribution], which is based on the concept, is not an *equality* in the specific character of the infringement, but in its character *in itself* – i.e., in terms of its *value*.

Proportionality according to “value” demands that we draw what Hegel labels “qualitative” distinctions between types of crimes (like robbery and theft), which we then use as our reference in deciding the type or length of punishment (quantitative distinctions) (§101). As long as we are consistent in assigning more serious punishments (like longer sentences) to more serious wrongs (like robbery), then we are following the proportionality injunction. Notice that Hegel’s retributivism does not commit him to upholding *lex talionis* as his emphasis on the term “value” signifies. Hegel explicitly dismisses *lex talionis* for both practical and moral reasons. His practical argument takes the following form: “It is very easy to portray the retributive aspect of punishment as an absurdity (theft as retribution for theft, robbery for robbery, an eye for an eye, and a

tooth for a tooth, so that one can imagine the miscreant as one-eyed or toothless)” (§101R). His moral argument is not that *lex talionis* is inherently prone to immoral excess (e.g, rape for rape, etc.) and therefore seems to violate our moral intuitions, but that it denies our ability to think abstractly, that is, to think like a person. Otherwise put, *lex talionis* denies our status as free beings by requiring submission to our immediate (i.e., emotional or “personal”) selves (§101A). By contrast, conceiving of punishment in terms of value “raises our representation [*Vorstellung*] of a thing above its immediate character to the universal” (ibid). Raising thought out of our immediacy properly constitutes what it means to think like a person.

Thus, given that Hegel’s punitive theory explicitly contains desert and proportionality theses, it is not surprising Hegel is read as a positive retributivist. Indeed, if the “Abstract Right” section contained Hegel’s whole punitive theory, it would be accurate to consider Hegel a positive retributivist.

C. Schild’s Negative Retributivist Interpretation

Schild notes that Hegel’s punitive theory extends beyond his discussion in “Abstract Right” into “Civil Society,” a subsection of “Ethical Life.”⁶⁵ Indeed, it is fitting that Hegel’s theory of punishment is thoroughly developed in “Civil Society” because only civil society has courts and juridical proceedings.⁶⁶ Therefore, punishment in “Abstract

⁶⁵ Schild, 158.

⁶⁶ It may appear surprising that Hegel includes courts in his depiction of civil society and not in “The State.” Hegel has in mind that because civil society is the realm of the marketplace, members relate to each other too contingently (i.e., based on particular self-interest and not as universal beings. See §§182-187, 208.). Thus, civil society is not the highest form of freedom in ethical life, but rather the state is. Nevertheless because most crimes are market related (e.g., theft) or aimed directly at particular members,

Right” is impoverished because “the annulling of crime in this [abstract] sphere where right is immediate is principally revenge” (§102).⁶⁷ But what about the absence of courts makes punishment a form of vengeance? Hegel states that punishment is vengeance when it (1) wholly depends (is “contingent”) on the whim of an individual to inflict it and (2) “appears as only particular,” that is, biased, to the offending party himself (ibid). Because of this bias, punishment appears to the offending party as a new crime, a wholly unjustified action, which calls forth its own punitive response. Consequently, punishment is unstable because it induces an “infinite progression” of revenge (ibid).

In civil society crime is no longer solely a particular affair because it references legal concepts like property. Legal concepts are distinct from particular concepts because they explicitly invoke all legal subjects through universally enforcing a set of applied rights and duties. Thus, property is a legal concept when some governing body (e.g., the state) universally upholds its validity and safeguards it against infractions (e.g., theft). Conversely, infractions of legal norms are universal as well. That is, legal infractions are salient because they implicitly deny the foundation of civil society itself: adherence to legal custom. Thus, crime is important not just to the immediately relevant parties (e.g., victim and wrongdoer) but to all legal subjects. Indeed, this emphasis on the external nature of crime, in contrast to the criminal’s personal reasons for acting perniciously (crime’s subjective side), undergirds Hegel’s (as well as our own) notion of

courts are in civil society because they respond to particular crimes. In fact, Hegel contradicts himself on this point by including the legislative and executive branches in the state. In this sense, civil society is “in” the state. See §§287, 298.

⁶⁷ Given Hegel’s link between punishment and revenge in “Abstract Right,” it is somewhat curious how Hegel’s comments on revenge ever lent support to an “Abstract Right” retributivist interpretation, which construes punishment as just. Hegel explicitly states in §220 that the private nature of revenge makes it unjust.

“legal responsibility.”⁶⁸ This is not to say juridical proceedings are incapable of taking into consideration criminals’ reasons for acting wrongly, but it does mean courts are principally unconcerned with these considerations.⁶⁹

For Hegel, crime’s (external) significance increases by the magnitude of danger it poses to society. Crime’s magnitude of danger encompasses two forms: (1) through actually spreading crimes, for example, when an arsonist means to burn only one building, yet ends up burning a whole city block; and (2) through encouraging other crimes. Criminals encourage criminal activity because they are rational and rational agents will universal maxims. “Anyone who performs acts at all, does something, as a thinking human being, which is to count as valid in general.”⁷⁰ In other words, irrespective of what criminals intend (e.g., a particular maxim) they cannot help but engage in an already constituted field of social meaning, which treats certain actions (namely, criminal actions) as wrong. “From this perspective, the danger in question is a determination that belongs to one’s act as such.”⁷¹

Yet, just because crime is inherently dangerous, that does not mean crime is inherently damaging. “If society is secure, and a peaceful condition prevails, crimes are thereby demoted to cases of individual [in contrast to universal] acts. If the laws are upheld, then crime has not really damaged society as such.”⁷² Hence, the stability of law

⁶⁸ Schild, 161. Reference to Hegel’s discussion of culpability in §132.

⁶⁹ That is, presuming the criminal is rational and either knew or could have known the legal prohibition. Hegel, of course, thinks subjective considerations are necessarily pertinent regarding children and severely mentally ill persons who break the law because they, strictly speaking, are irresponsible for their actions. See §120.

⁷⁰ Schild, 160. Quote from Hegel: VPR4, 28off.

⁷¹ Ibid.

⁷² Schild, 160. Quote from Hegel: VPR4, 550.

helps deny the influence of crime's message and prevent the criminal's act from encouraging others because the law (right) is clearly seen as distinct from crime. "Then I do not infer from the existence of crime that it is supposed to embody the existence of my evil will, but it becomes rather a quite particular affair, and the side through which the crime might become more dangerous also equally well can be disregarded under the law-governed conditions of civil society."⁷³

Hegel's discussion of danger explicitly marks a practical turn away from "Abstract Right's" theory of punishment. Danger references legal concepts and therefore a universal state of affairs the meaning of which exceeds individual crimes' values. This is why danger is conceptually unavailable in "Abstract Right"; its reference to universal norms (laws) contrasts with "Abstract Right's" immediacy where individual persons punish crime in an unspecified and contingent way (revenge).⁷⁴ When Hegel applies the idea of danger to punishment he says, "The fact that an injury to one member of society is an injury to all others does not alter the conception of wrongdoing, but it does alter it in respect of its outward existence" (§218R). In other words, the concept of wrongdoing remains constant: wrongdoing is the intentional violation of another's right. However, in civil society, wrongdoing takes on an added meaning: wrongs reference all members of civil society. This added reference is associated with the "actual" wrongdoing that potentially endangers or harms all societal members through the message it sends and the potential influence of that message when it undermines legal stability. Therefore, Hegel claims, if "society has become strong and sure of itself" it can diminish "the

⁷³ Ibid. Quote from Hegel: VPR4, 551.

⁷⁴ Schild, 167.

external importance of the injury” and mitigate its punishment (§218). This emphasis on danger, according to Schild, illustrates that in civil society Hegel’s punitive theory is not positively retributivist. Of course, courts can always decide to impose desert-based punishment because such punishment is always permissible; it “respects” the wrongdoer’s agency. However, under certain conditions (i.e., living in civil society), treating criminals in accordance with their just deserts is not required. Courts retain the right to bypass desert-based punishment when mitigating sentences.

Schild neglects, however, to discuss the rest of §218. There Hegel says that, understood in the context of danger, crime’s “quality of magnitude varies, however, according to the *condition* of civil society, and this is the justification [what makes it permissible] both for attaching the death penalty to a theft of a few pence or of a turnip, and for imposing lenient punishment for a theft of a hundred and more times these amounts.” Here it is plain that Hegel does not limit punishment according to the prejusticial desert thesis in direct violation of the retributivist core criteria that makes desert the upper limit. It seems, then, that Hegel, at least according to the retributivist, takes “excessive” punishment to be justifiable. And if excessive punishment is justifiable, something besides desert does the primary justificatory work. Thus, Hegel is not open to Schild’s negative retributivist interpretation because, at least in “Ethical Life,” Hegel justifies punishment along consequentialist lines, which appear to permit excessive punishment.

D. The Social Conditions Which Legitimize Negative Retributivism

At this point, one might think Hegel is simply inconsistent; he presents us with two wholly distinct theories, retributivism and consequentialism. I think attributing inconsistency to Hegel rests on misinterpreting how *The Philosophy of Right* works as whole. In order to see how Hegel is consistent, we need to understand how his punitive theory fits into *The Philosophy of Right*. As we shall see, the entire purpose of *The Philosophy of Right* is to outline the highest and most substantial form of freedom appropriate to man, the freedom of ethical life, or, as I will also sometimes call it here, social freedom.⁷⁵ I explain this relation in two major steps. First, I illustrate how “Abstract Right’s” notion of desert is prejusticial, and, that when personality (linked as it is to desert) is construed as freedom, it ultimately leads to irrationality. Then, I argue that “Ethical Life’s” notion of social freedom (which is conditioned by *just* social institutions) transforms “Abstract Right’s” notion of desert into a legitimate moral concept. Thus, Hegel’s emphasis on social freedom saves desert as a moral notion, however, he rejects it understood as prejusticial concept.

Abstract Right and Personal Desert

Recall that when Hegel uses the term “right” he means some kind of actual existence of the free will (§1). Indeed, Hegel says, *The Philosophy of Right* is the examination of the different ways and stages through which the will becomes free (§33).⁷⁶ Hence, when

⁷⁵ In employing the term “social freedom” to designate Hegel’s most substantial form of freedom, I follow Frederick Neuhaus. See his book *Foundations of Hegel’s Social Theory* (Cambridge: Cambridge University Press, 2000).

⁷⁶ The stages of freedom which *The Philosophy of Right* outlines do not reflect the chronological order whereby freedom is realized in the real world. In this sense, the ordering of the book is itself an exercise in abstract reasoning. See §32A Knox. Here and elsewhere throughout the paper I reference T.M. Knox’s

Hegel begins *The Philosophy of Right*, and labels the first major section “Abstract Right,” we know this term designates some instance or kind of freedom. What kind of freedom then is abstract freedom?⁷⁷

In explaining “Abstract Right’s” freedom, it helps to examine one of its core features, personhood. Hegel tells us personhood is marked by “immediacy” and “formal universality” (§§34,35). By this, Hegel defines persons by their capacity to abstract their wills from all objects or content. Insofar as all individuals confront this capacity immediately, that is, on reflection abstracted (or non-mediated) from external objects (including human beings), personhood is universal. Abstract reasoning is crucial to freedom because through reflecting we remove ourselves from our drives, specific situations, and all other “particularities,” and thus acknowledge our fundamental nature as self-determining beings (§7). Indeed, the concept of personhood (abstract self-determination) grounds all of the institutions Hegel addresses in “Abstract Right”: contract, property, and punishment. Hegel claims personhood is plagued, however, by “arbitrariness” and “contingency” (§§15,16). In other words, since the person’s free identity determines itself based off its capacity to abstract from all content, the “I is totally empty” (§4A). Thus, the person is not bound to identify with any particular action and in fact chooses to act based on whim, that is, off no principled basis (§§16,17).

translation instead of Nisbet’s. See, *Hegel’s Philosophy of Right*, translated by T.M. Knox (Oxford: Oxford University Press, 1967). However, it is unfair to say the ordering of the book is totally an exercise in abstract reasoning because Hegel makes clear that the real social conditions which underlay social freedom (the highest freedom) are presupposed in being able to designate the lower stages as “one-sided.” See 57A.

⁷⁷ For the remainder of the paper I will sometimes write abstract right in lowercase to designate abstract freedom. I will capitalize it when referring to the section “Abstract Right” proper. Similarly, I will lowercase ethical life when designating social membership.

Because we know that personhood is central to each feature of “Abstract Right,” we also know it must apply to Hegel’s retributive discussion of punishment, located, as it is, in “Abstract Right.” This fact alone should make us suspect towards Hegel’s alleged retributivism. Nevertheless, for the moment let us discount Hegel’s later more consequentialist sounding comments and pretend “Abstract Right” includes all of Hegel’s remarks on punishment. How would punishment and desert look then, when read through the lens of personhood? In keeping with the generic features of personhood, Hegel tells us that desert cannot take into account particular features of criminality we usually think are essential in determining just sentences like the criminal’s intention, age, and degree of cognitive development (§99R).⁷⁸ Desert also cannot consider particular consequences of the crime; it must treat like crimes alike even when they have dissimilar consequences; e.g., when one arsonist burns one building and another burns a whole neighborhood. Moreover, because judges (whether legal or some other kind) lack a principled basis by which to determine sentences, their sentences are contingent on whim. This is the real reason why in “Abstract Right” Hegel labels retributive punishment revenge (§102). It’s revenge because there is no guarantee that most persons will agree the sentence is just since the judge (and everyone else) lacks a shared principled basis to determine sentencing. Punishment, then, is just as likely to be considered an “infringement” of the criminal’s rights rather than something just (§101).

⁷⁸ It might seem that Hegel is contradicting himself when he says abstract desert cannot take intention into account while simultaneously defining crime (or wrong) as the intentional violation of another’s right (§95). However, Hegel avoids contradiction because the definition of crime only employs intention in an abstract way (i.e., where intention is merely the willful violation of another’s right) whereas ethical life considers intention in a concrete way (i.e., the criminal’s particular motivation and aim).

Both the positive and negative retributivist think desert is sufficient to make punishment just. Hegel's account of personhood and desert seems to yield the same conclusion; because desert is correlated with personhood, and despite the fact that Hegel says little of justice proper in "Abstract Right," it can be inferred that satisfying desert claims entails justice. However, Hegel does not regard personhood as a perfectly realized kind of freedom for it lacks a (1) a principled basis to determine itself and (2) access to a shared meaning which guarantees social stability. Personhood is, then, ultimately fraught with deep limitations, most notably its excessive formalism. So if Hegel's theory of punishment is to have any purchase we must either accept his highly problematic account of abstract freedom in justifying punishment, which as we've seen appears highly unpromising, or look to later sections of *The Philosophy of Right* for different accounts of freedom and desert.

Ethical Life and Social Desert

Hegel outlines his highest conception of freedom in the "Ethical Life" section. Ethical life incorporates the positive component of "Abstract Right's" notion of freedom, namely the capacity for reflection, while providing more particular (and universal) content to our understanding of freedom. In contrast, then, to abstract right's protagonist, the person, individuals in ethical life manifest as social members.

In Hegelian language, abstract right's notion of the "abstract universal" is to be contrasted with ethical life's "concrete universal" (§§24,144).⁷⁹ First, a note about the concrete. For, Hegel, the concrete is best understood through reference to particulars.

⁷⁹ By "concrete," Hegel also means actually existing.

Since individuals are not only abstract entities or persons - universally the same through their ability to distance themselves from all determinate content - but also particular beings with distinctive identities, tastes, values (i.e., with distinct reflectively endorsed moral principles), any adequate account of freedom must include room for these individualistic desiderata. Indeed, Hegel claims modernity's greatest distinctive trait, in direct opposition to ancient Greece, is to safeguard and foster the individual's freedom to be an individual; that is, modern individuals and governments input particularities into their definitions of freedom (§§124,153-157). Hegel makes clear though that taking particular values seriously also has its problems. For instance, it can lead to emphasizing the sovereignty of subjectivity, as when individuals are judged solely according to their "inward actions" or intentions (§106A). The idea here is that subjectivity construed as a purely voluntary state and therefore opposed to all actions which violate one's voluntary state, is just as abstract (i.e., "one-sided") as the freedom of personhood explicated in "Abstract Right" (§108).⁸⁰

Luckily, in "Ethical Life" when Hegel discusses the importance of particularity, it's not in reference to this pure and abstract particularity, but, again, to the "concrete *universal*." Thus, by mention of the term "universal" Hegel is not denoting pure subjectivity, but rather a relationship shared by many individuals within society. By fusing the term concrete to universal Hegel designates the distinctive kind of freedom characteristic of ethical life: individuals with particular identities (including subjectively

⁸⁰ Hegel actually outlines the notion of freedom as subjectivity in the "Morality" section, which precedes "Ethical Life." I mention it here under "Ethical Life" because it (1) is easier to grasp than abstract right and therefore needs less space to explain and (2) is more explicitly a core feature (i.e., subsumed) in ethical life.

endorsed values) stand in *relation* to others through the fact that shared relations inform and undergird individuals' particular identities. Moreover, individuals are led to subjectively endorse the fact that their particular identities are universally shared through the process of education (*Bildung*) which the just modern institutions of the family, civil society, and the state, enable (§157)⁸¹; indeed what designates them as just is their ability to objectively instill proper moral education.⁸² Social members' freedom is marked by recognizing and willing the fact that one's particular identity depends on and is informed by one's relation to others, what Hegel calls "being with oneself in an other."⁸³ All moral notions which carry any normative force in modernity must in turn reflect this structure of social freedom, the unity between particular and universal. Punitive desert is one such notion. Its particular content might include taking a poor thief's situation into account when sentencing, the universality of which would be applying the same sentence to all poor thieves.⁸⁴ Thus, insofar as social freedom presupposes the modern institutions that foster social freedom, desert, understood as a legitimate moral idea that unites the particular to the universal, in turn presupposes the same institutions. In other words, desert for Hegel is not prejudicial, but postjusticial: "The sphere of right...must have the ethical as [its] support and foundation."⁸⁵

⁸¹ See also the subsections "The Family," "Civil Society," and "The State."

⁸² Proper education establishes the platform upon which individuals share the interpretation regarding the messages of crimes and danger.

⁸³ See §7A, however I rely on Neuhausser's translation of *Beisichselbstsein in einem Anderen*, not Nisbet's or Knox's. See Neuhausser, 19.

⁸⁴ Hegel discusses the need to take poor thieves' economic situations into account in §127. His discussion there is a criticism of the abstract notion of desert for abstract desert cannot take economic situations seriously but sees all theft similarly.

⁸⁵ §141R Knox.

Let us now reconsider the passages where Hegel appears to endorse consequentialism:

[Legal stability] gives rise to the viewpoint that an action may be a *danger* to society. On the one hand, this increases the magnitude of the crime; but on the other, the power of society has become sure of itself, and this reduces the external importance of the injury and so leads to a greater leniency in punishment (§218).

Hegel continues in the remarks:

This quality or magnitude [of crime] varies, however, according to the *condition* of civil society, and this is the justification both for attaching the death penalty to a theft of a few pence or a turnip, and for imposing a lenient punishment for a theft of a hundred and more times these amounts (218R).

Both passages deal with a concrete understanding (the magnitude) of crime, in opposition to an abstract understanding of crime. I say “concrete” because both consider crime in the context of society’s particular legal situation, which, (and this is the part the traditional retributivist will deny) directly informs the magnitude or seriousness of crime understood in its particularity (here, through *comparative* reference to legal stability and not, for example, the criminal’s intention, something equally worth referencing). It is obvious then that Hegel implicitly rejects the prejudicial notion of desert because the prejudicial notion claims that we can understand desert and crime irrespective of particular circumstances and irrespective of just social institutions. However here, Hegel assumes that social members understand punishment via shared terms (for otherwise society would be impotent in attaching any universal meaning to crime) and therefore in the correct way (and not as, say, revenge). Insofar as these shared terms are rational they take particularity seriously, a value dependent on and fostered by modernity’s just social institutions.

One might still wonder how these last comments of Hegel's are consistent with his earlier more straightforward and apparently retributive theory of punishment. After all, doesn't Hegel take two very different attitudes towards punishment in these two different sections of *The Philosophy of Right*? In reply, it is certainly true that Hegel says two different things regarding punishment in the "Abstract Right" and "Ethical Life" sections; however, Hegel's attitude remains the same. Punishment's nature as a just institution depends on a shared meaning of crime and that includes agreeing on which particular aspects of the crime (e.g., intention, direct and social effects) matter. Since morally shared meanings are impossible without the proper education, moral categories presuppose just social institutions. Thus, ascribing to Hegel the earlier apparently retributive view is incorrect. Hegel does not believe in the justice of traditional prejudicial retributivism, which he expresses in his critical remarks both in "Abstract Right" (which at first appears confusing because Hegel applies "Ethical Life's norms back onto "Abstract Right's") and "Ethical Life." Readers intent on interpreting "Abstract Right's" punishment as retributivist should be reminded that Hegel's criticism of "Abstract Right's" theory of personhood as the most substantial kind of freedom, applies as well to his view towards punitive desert. Again though, this is not to say Hegel rejects personhood or punitive desert in total. The rational aspects of these ideas are incorporated in Hegel's later discussion of social membership (namely, the universal and reflective components). Since the rational aspects of desert are incorporated, Hegel is committed to upholding the retributivist criteria to bar punishment in excess of criminals' desert. The rational aspects prohibit excessive punishment because they yield

the proportionate idea that punishment is the “negation of the [crime’s] negation” (§97A); universally because *all* crimes must be adequately (i.e., proportionately) addressed if freedom is to be made stable and reflectively because criminals can view their punishment as deserved only if it corresponds to their crime’s value. It is in this sense, that Hegel’s view is expressivist; punishment expresses to rational subjects the enforcing of legal norms, not the violation of another’s rights. Hegel is a negative retributivist in the further respect that he grants courts and political leaders the right to pardon and excuse offenders (§127, 282), not because desert-based punishment is always just, as Schild seems to suggest (for such desert could be construed prejudicially).⁸⁶ However, barring these kinds of considerations, Hegel does think it the duty of courts to respond to wrongs via punishment. Hegel seems to leave room though for non-incarcerating forms of punishment when he describes punishment as a “cancellation” and “counter-example” to crime’s false messages (§§99, 218A).⁸⁷

E. Concluding Remarks

Retributivists intent on punishing according to a prejudicial notion of desert encounter practical problems like determining how the grounds to punish can be agreed upon in the absence of just institutions, epistemic problems like determining how individuals are warranted (mean the same thing) in their desert claims, and moral problems when they

⁸⁶ Schild also notes that Hegel makes pardoning legitimate. Wolfgang Schild, “The Contemporary Relevance of Hegel’s Theory of Punishment,” 172-73. Schild suggests though that pardoning is an act distinct from justice proper (something only the monarch who stands outside justice can grant) and he does so for obscure metaphysical reasons. Whether or not this is wholly correct according to Hegel, on my interpretation, pardoning is consistent with justice because justice never *requires* incarceration.

⁸⁷ Hegel seems to imply that non-incarcerating forms of punishment are acceptable when society is secure and therefore that the “meaning” of individual crimes is innocuous.

seem to endorse ignoring the particularities of the crime. Hegel's punitive theory corrects these deficiencies by rejecting prejusticial desert while remaining tied to an expressive theory of punishment as well as upholding the morally attractive negative retributivist criteria of making desert punishment's upper limit. Hegel's theory also seems to have the morally attractive feature of permitting non-incarcerating forms of punishment like explicit state-endorsed moral condemnation (insofar as such condemnation is an obvious "counter-example"). To those skeptical of making desert dependent on factors like legal stability for fear of diluting the steadiness of desert in the face of historical change, I can only appeal to intuition. Surely a seemingly minor crime that threatens legal stability is not minor. And although it is possible to conceive actually minor crimes as undermining legal stability (like littering), it is obviously unlikely to actually occur.

CHAPTER IV

OUTLINE FOR A HOLIST PUNITIVE THEORY

In the last chapter, I showed that, for Hegel, desert is a dynamic moral concept, which can incorporate many different elements (e.g., the criminals' intentions and his crimes consequences). I also argued that Hegel's punitive view is a negative retributivist theory that rejects the prejudicial conception of desert. Having established these two claims though, it is worth further pondering the relationship between making desert judgments and justice. I do just this in two major steps. First, I draw upon contemporary holist theory. "Holism" is the view that stresses prior standards of justice in determining an individual's deserts. Samuel Scheffler maintains that holism is not relevant to all aspects of desert, however, but is limited to desert of economic resources. Second, and in contrast to Scheffler, I contend that holism is equally pertinent to punitive desert. In developing my argument, I employ principles derived from Jean Hampton's and Hegel's punitive theories, which give strong evidence in support of punitive holism.

A. Scheffler's Asymmetrical Holism

Scheffler defines economic holistic theories as asserting,

that the justice or injustice of an assignment of economic advantage to a given individual always depends on the justice, as judged by some prior standard, of the overall distribution of benefits and burdens among people.⁸⁸

Scheffler contrasts holism with absolute and proportional desert theories. Absolute desert theory maintains, "for each person there is an absolute level of advantage that the

⁸⁸ Samuel Scheffler, "Distributive Justice and Economic Desert," in *Desert and Justice*, ed. S. Olsaretti (Oxford: Clarendon Press, 2003) 69-92, at 81.

person deserves to be at.”⁸⁹ Accordingly, justice “consists in giving each person what he or she absolutely deserves.”⁹⁰ To illustrate, consider Bill who absolutely deserves sixty-six gold stars for his performance on a school project. This means that irrespective of what others deserve (and irrespective of how others are treated), Bill still deserves sixty-six stars. It is worth noting that absolute desert corresponds to what we earlier called noncomparative justice. Recall, Feinberg defines noncomparative judgments as claiming that a person’s “rights-or-deserts alone determine what is due him.”⁹¹ For noncomparative judgments, as in absolute desert, the object of desert (i.e., the number of gold stars) is “fixed independently of what other people deserve.”⁹²

By contrast, proportional desert theory employs comparative judgments.

This view asserts that each person deserves a share of total resources that is proportional to his or her relative effort or productivity, and that justice requires distribution in accordance with individual desert so understood. [It also maintains] that an individual’s just allotment is just if it is the allotment that the individual would receive in a just overall allocation.⁹³

Comparative judgments enter here via the “total resources” available which each individual compares to him or herself, thereby implicitly comparing him or herself to all others. Comparative judgments are not, however, the distinguishing mark of proportional desert theory; after all, we make use of such judgments without necessarily supposing proportional constraints, for instance when awarding prizes in a contest.⁹⁴ Instead,

⁸⁹ Shelly Kagan, ‘Equality and Desert’, in *What Do We Deserve? A Reader on Justice and Desert*, ed. L.P. Pojman and O. McLeod (New York and Oxford: Oxford University Press, 1999) 298-314, at 300.

⁹⁰ Scheffler, “Distributive Justice and Economic Desert,” 83.

⁹¹ Feinberg, “Noncomparative Justice,” *The Philosophical Review* 83 (1974): 297-338, at 300.

⁹² Scheffler, “Distributive Justice and Economic Desert,” 83.

⁹³ *Ibid.*, 83.

⁹⁴ Feinberg, 299. Awarding prizes is distinct from proportional theory insofar as most contests do not assume the prize should be proportionately distributed.

Scheffler notes, proportional desert theory's salient feature is its assertion that an "individual's actual allotment is just if it is the allotment that the individual would receive in a just overall allocation."⁹⁵ To illustrate this feature, consider the following: Bill and Sally are working on a joint assignment and each will be awarded a proportion of ninety-nine gold stars depending on their effort.⁹⁶ Suppose Sally works twice as hard as Bill. This means she should receive sixty-six stars and he thirty-three. However, proportional desert theory maintains that Sally is treated justly if she receives sixty-six stars *no matter what Bill receives*. So if, for instance, there's a star shortage and Bill only receives ten stars, but Sally still receives sixty-six, then proportional theory maintains Sally is nevertheless treated justly because it is the allotment she "would receive in a just overall allocation."⁹⁷

Despite their differences, absolute and proportional desert theories both retain the traditional definition of justice employed by Feinberg: "Justice consists in giving a person his due."⁹⁸ By contrast, holistic theories reverse the traditional definition: Desert consists in giving a person what justice gives him, what justice defines as desert. This reversal though has one qualification: According to the holist, we cannot arrive at a judgment about the justice of allocating a benefit to a particular individual without also taking into account "considerations about the justice or injustice of the overall distribution of benefits that obtains."⁹⁹ If, then, the overall allocation is unjust, then an individual cannot be said to deserve some X. This is what I mean by the holistic reversal:

⁹⁵ Scheffler, "Distributive Justice and Economic Desert," 83.

⁹⁶ This example is Scheffler's. See "Distributive Justice and Economic Desert," 83.

⁹⁷ Ibid.

⁹⁸ Feinberg, "Noncomparative Justice," 298.

⁹⁹ Scheffler, "Distributive Justice and Economic Desert," 84.

desert rides piggyback on justice.¹⁰⁰ So, to use the gold star example yet again: If the overall distribution of gold stars is considered just at two stars per student and, indeed, each student has two stars, then giving Bill sixty-six stars because he deserves it is not only unjust, but conceptually incorrect. It is conceptually mistaken because, according to the holist, desert is nothing more than assigning an individual the two stars that satisfy the prior just distribution. Hence, if someone makes a desert claim that appears distinct from referencing the just distribution, then a likely response might be: “Are you sure you know what desert is?”

At this point, the following objection is anticipated: But why should we adopt a holistic theory of desert? After all, aren’t the absolute and proportional theories more in line with our intuitions? Can’t we say an individual deserves something even if the overall allocation is unjust?

This objection is serious and any holist must at some point deal with it. Luckily, for the purposes of this chapter, I think a full reply is unnecessary because my aim is not to refute absolute or proportional desert theory, but to merely argue that there are strong reasons in favor of adopting a punitive holist theory. So I will simply presume that while the intuitions behind the absolute and proportional theories are reasonable, so are the following holist intuitions: (1) Persons have equal moral worth and justice denies treating some people as having greater intrinsic worth than others. (2) Economic

¹⁰⁰ Scheffler notes that both utilitarianism and Rawlsian accounts of distributive justice are holistic. Utilitarianism is holistic insofar as individuals are said to deserve an advantage only if that assignment is part of an overall distribution that maximizes utility. Rawlsian accounts are holistic insofar as individuals are said to deserve an advantage only if that assignment is part of an overall distribution “generated by social institutions that are regulated by Rawls’s two principles of justice.” Scheffler, “Distributive Justice and Economic Desert,” 81-82.

distribution concerns the “proper division of social advantages,” with the “things that people are presumed to want.” (3) In modern society people’s material resources are limited to the extent that it is impossible to satisfy the demands for such resources. (4) People’s “lives are profoundly structured by their common participation in a complex network of social, political, and economic institutions”¹⁰¹ which establish and regulate social cooperation. Thus, as a result of the “empirical” premises, (2) allocation of benefits, (3) material scarcity and (4) economic interdependency, holists maintain that any allocation to some persons “may affect the supply available to others.”¹⁰² Hence, all four intuitions foster the holist principle that “it makes no normative sense to assess the justice of an allocation of resources to any one individual in isolation,”¹⁰³ without first considering all persons’ resources within the given distribution.

Critics of holism may further object that economic holists are committed to holism in all ethical cases, not just economic ones. Full-fledged holism, they might think, is unacceptable because it would mean completely abandoning our intuitions regarding “prejudicial desert.” Prejudicial desert designates the view that desert is meaningful outside of or prior to justice as well as the view that desert judgments can be made without referencing background conditions.¹⁰⁴ Traditionally, theorists have marked punitive desert as a type of prejudicial desert. Therefore, critics of holism might

¹⁰¹ Scheffler notes the first and last two intuitions in “Distributive Justice and Economic Desert,” 82. He mentions the second in “Justice and Desert in Liberal Theory,” *California Law Review* 88(2000); 965-90, at 986.

¹⁰² Scheffler, “Justice and Desert in Liberal Theory,” 986.

¹⁰³ Scheffler, “Distributive Justice and Economic Desert,” 82.

¹⁰⁴ In Chapter III I defined prejudicial desert more broadly as the view that desert is meaningful outside of or prior to justice. Thus, I did not include the part, mentioned here, that prejudicial desert is also marked by its lack of reference background conditions. From now on, by prejudicial desert, I mean this fuller definition.

think that insofar as economic holists are committed to full-fledged holism (which includes punitive holism), holism must be rejected because it requires giving up prejudicial punitive desert. It is unclear, however, why economic holists are committed to full-fledged holism. It is certainly conceivable to be a holist concerning a specific domain, but not others. In this respect, Scheffler notes, John Rawls provides an example. Rawls maintains an “asymmetrical” stance towards holism, upholding holism in the economic case, while denying it in the punitive case.¹⁰⁵ Although Rawls never fully accounts for his asymmetrical position, Scheffler defends Rawls by arguing the premises economic holists’ cite do not obtain in the punitive case. As we saw above, such premises include material scarcity, the allocation of benefits, the interdependency of persons, and the intuition that economic desert is meaningful only in, as opposed to outside of or prior to, just distributions. The economic holist is not committed to punitive holism because punishment does not distribute benefits (punishment is obviously a burden, not a benefit) nor does punishment concern punitive scarcity (“the supply of punishment may be assumed to exceed people’s demand that they themselves be punished”).¹⁰⁶ As far as the critics’ prejudicial intuition, Scheffler notes that prejudicial punitive desert is legitimate because “wrongful action would be wrong even if it were not illegal,”¹⁰⁷ that is, even it were outside of justice. Indeed, judgments of punitive desert “are related in a particularly intimate way to those reactive attitudes whose role in

¹⁰⁵ Scheffler, “Justice and Desert in Liberal Theory,” 988. Rawls’s asymmetrical position is inferred from sections 17 and 48 in *A Theory of Justice* where he discusses desert. See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

¹⁰⁶ Ibid., 986.

¹⁰⁷ Ibid., 987.

the thought of responsible agents we are supposing to be *effectively ineliminable*.”¹⁰⁸

Here “ineliminable” is meant to convey the fact that prejusticial punitive desert corresponds to the reactive attitude of resentment, which is aimed at someone or some institution for the breaching of a normative expectation. Since the reactive attitudes are constitutive of moral subjectivity itself and therefore not tied to institutions, judgments of prejusticial punitive desert are legitimate;¹⁰⁹ to deny them would deny a central feature of moral subjectivity, namely, resentment.¹¹⁰ These points strongly suggest that economic holists need not be committed to full-fledged holism because they can uphold prejusticial desert in the punitive context.

B. Punitive Holism

Now, certainly the first two reasons Scheffler cites in arguing that economic holism is not committed to punitive holism are correct: (1) economic holism governs benefits, not burdens and (2) economic holism, unlike punitive holism, concerns material scarcity. Because, then, economic holism considers factors that do not pertain in the punitive case, economic holism does not entail punitive holism. The economic holist simply cites a different class of reasons than the punitive holist (and indeed, Scheffler does not even cite hypothetical premises in support of punitive holism). Here, I do not dispute these

¹⁰⁸ Scheffler, “Distributive Justice and Economic Desert,” 75. My italics.

¹⁰⁹ Scheffler himself does not explicitly use the term “legitimate” to describe prejusticial punitive desert. However, I attribute to him this view because he clearly thinks moral responsibility (with which punitive desert is bound up within) is prejusticially legitimate.

¹¹⁰ Scheffler makes clear, though, that just because he thinks the nature of desert is fundamental to moral responsibility and therefore legitimate, does not commit him to the view that the institution of punishment, which expresses this reactive attitude, is legitimate. Scheffler, “Distributive Justice and Economic Desert,” 76.

two premises and the conclusion they yield: that economic holists are not necessarily committed to punitive holism. Interestingly, however, Scheffler provides us with a third reason in favor of his conclusion and it is this reason that I want to now examine and criticize. Scheffler's third reason in favor of his conclusion is: (3) because punitive desert corresponds to the reactive attitude of resentment, an attitude fundamental to and constitutive of moral responsibility itself, desert is a legitimate prejusticial concept. Because I have already granted Scheffler's claim that economic holists are not committed to punitive holism, my contention with (3) is isolated from Scheffler's overall argument. Instead, and through drawing on both Jean Hampton's and Hegel's punitive theories, I argue that, contrary to Scheffler, punitive desert's moral legitimacy presumes actually obtaining just social norms and just social institutions, which desert judgments must reference. Therefore although economic holism may not bind us to punitive holism, punitive holism is still morally attractive.

Hampton's Holistic Desert Structure

Given that Chapter III begins with the claim that Hampton endorses prejusticial desert, my plan to now discuss how Hampton's punitive theory contains insights that support holist principles may appear contradictory. After all, isn't prejusticial desert opposed to holism? It is true that holism's definition rules out accepting prejusticial desert and it is also true that Hampton's endorses prejusticial desert. Consider her claim that, "retribution [desert] is a response to the damage to value implicit" in wrongfulness, or, value-denying action.¹¹¹ Here no mention of justice or just institutions is made.

¹¹¹ Hampton, "Correcting Harms and Righting Wrongs," *UCLA Law Review*, Vol. 39, 1992, 1685.

Nevertheless, I think discussing Hampton's theory in the context of holism makes sense, and, more importantly, provides strong reasons in favor of adopting punitive holism, even though Hampton herself might not have endorsed holist conclusions.

Before proceeding, though, first recall Scheffler's definition of holism:

The justice of any individual's share depends on the justice, as judged by some prior standard, of the overall allocation of which it is actually a part.¹¹²

Now, I am going to make a distinction between those who interpret this definition strictly, let's call them "conservative holists," from those who interpret it less strictly, "liberal holists." What determines whether an interpretation is strict, and therefore conservative, is if it concentrates on the term "justice." The conservative holist then bans anyone entry to the conservative holist club if they fail to designate that the X prior to desert is justice. By contrast, the liberal holist refrains from using the language of justice, but nevertheless maintains the structure of holism's definition: The desert of any individual depends on the X, as judged by some prior standard, of the overall allocation of which it is actually a part. In other words, the liberal holist accepts anyone's usage of desert so long as it includes the commitment to referencing a prior X where X is taken to be a reasonable distribution.

It is this second type of holism, the liberal kind, which Hampton appears to employ. This implicit endorsement of holism is evident in the following point regarding punishing sexual offenders:

¹¹² This a slightly modified definition of the one used earlier in the paper. Scheffler, "Distributive Justice and Economic Desert," 84.

When the present day Canadian courts use a sentencing policy that gives certain types of sexual offenders lighter sentences, on average, than those given to people who have been convicted of burglary, they are accepting a view of women that grants them standing similar to - but slightly lower than - mere objects.¹¹³

Hampton's point here is not simply that because sexual offence is more serious than burglary, it is unjust to punish sexual offenders less severely than burglary. Hampton is also making the stronger, more holistic, assertion that our judgments that sexual offenders deserve harsher punishment base themselves off a prior standard of punitive distribution. So, for instance, if burglary usually receives a sentence of X time, then, because sexual offence is more serious than burglary, sexual offence must receive a significantly harsher sentence than X in order to reflect its serious status. In other words, forming correct desert judgments requires consulting other crimes' standard sentencing guidelines. If, then, like the Canadian courts, we punish sexual offenders less harshly than other, say, non-violent criminals, it is likely that properly morally constituted persons will think we misjudged the case. Such persons will recognize that we have misunderstood the principle of proportionality (i.e., the idea that wrongdoer's deserve a punishment in proportion to the nature of their crime), presuming, that is, that we accept it (as most modern legal institutions and subjects generally do). Hampton's discussion of the Canadian courts makes clear that the proportionality principle is legitimate only insofar as it references an actual consistent standard that assigns crimes (though not necessarily the crime in question) specific punishments. This standard then serves as the reference point for correct desert judgments, a standard that, in the case of the Canadian

¹¹³ Hampton, "Correcting Harms and Righting Wrongs," 1692.

courts, is overlooked.¹¹⁴ As a result, these courts' desert judgments are incorrect, and punishment cannot properly express the victim's and wrongdoer's value, which as we saw in Chapter II, Hampton argues is the whole point behind retributive punishment.

Hampton's criticism of Canadian courts reflects and makes explicit the intuitive appeal of liberal holism: The problem with disregarding the overall distribution of punishment in a society is that it unhinges our desert judgments from their proper meaning. Crimes like burglary are assigned lighter sentences because they are less serious *than other crimes*. Therefore, to punish a serious crime like sexual offence less severely than burglary is to express, falsely, that sexual offence is not serious business. And because correctly expressing our desert judgments requires referencing a standard of punitive distribution that upholds the principle of proportionality (which is what makes the distribution just), Hampton's theory picks up on a common holist intuition that many of us already hold (as the Canadian court example indicates).

Hegel's Holistic Desert Structure

Hegel's theory of social freedom reveals yet another plausible and highly attractive holist principle. Before discussing this principle, however, it is necessary to recall from Chapter III that Hegel thinks forming desert judgments requires considering factors like

¹¹⁴ It is also a consequence of Hampton's implicit holism that there is no crucial moral difference between countries' sentencing guidelines so long as they punish proportionately (within reasonable limits). So, if Canada punishes sexual offence for X years and the US punishes it for X + 10 years, but each punish sexual offence in proportion to less serious crimes, then Hampton's implicit holism commits her to maintaining that each countries' sentence for sexual offence is legitimate. This is something many theorists writing on Hampton ignore because they think it is inconsistent with classical retributivism. See, David Farnham, "A Hegelian Theory of Punishment," 13. It is misguided, however, to say that she's inconsistent because Hampton never claims to be classically retributivist as is extremely evident when she says that under the right conditions, giving the victim a parade could be a retributive punishment. See, "Correcting Harms Versus Righting Wrongs," 1696. Furthermore, these non-classical retributivist examples are consistent with Hampton's theory if her theory is read through the implicit holism that I think she endorses. Linda Radzik pointed this out to me.

the criminal's economic background, intentions, and the consequences his crime effects (in essence, factors relevant to the particular criminal) and that the capacity to consider such particularities is acquired only under just social conditions; for it is only under such conditions that individuals are educated to value the relevant particularities. In essence, then, Hegel maintains a *postjusticial* view of desert. However, a postjusticial desert view is not the same thing as a holistic desert principle. The former says that proper desert judgments presuppose that just social conditions obtain.¹¹⁵ The latter demands that in order to determine whether a particular desert judgment is just, one is required to reference some prior X where X is taken to be just. One might think, though, that Chapter III's assessment of Hegel's postjusticial view has already shown that Hegel's theory contains a holistic desert principle: the X in Hegel's theory simply is the set of just institutions which foster social members' capacity to form proper desert judgments and their judgments are just insofar as they reflect the guiding principle behind those institutions (where the principle is the "concrete universal" idea, or, the respect for and fostering of particularities and universals). I think that this is correct. However, I think it is a mistake to call this principle holistic simply because it is too general. It is too general because the X in this case, the just social institutions, do not themselves have any direct conceptual relation to desert. To see this more clearly, consider again Scheffler's holistic definition:

¹¹⁵ It is worth mentioning here that a merely postjusticial desert view leaves room for either an absolute or comparative conception of desert. To employ Scheffler's Sally example: Sally deserves sixty-six gold stars no matter what anyone else receives (the absolute view); Sally deserves sixty-six gold stars if she works twice as hard as Billy (the comparative view). Both absolute and comparative conceptions of desert, then, lack reference to a prior just distribution.

The justice or injustice of an assignment of economic advantage to a given individual always depends on the justice, as judged by some prior standard, of the overall distribution of benefits and burdens among people.¹¹⁶

Here it is plain that “the overall distribution of benefits and burdens” (the background X) is conceptually related (as an economic concept) to “the assignment of economic advantage to a given individual” (the desert judgment). So on Scheffler’s view, holism means relating a particular class of desert (here, economic) to the same class of background condition (economic distribution). This is why I think it is a mistake to say that Chapter III’s analysis of Hegel yields a holistic principle. There we only saw that Hegel thinks just desert presupposes and reflects an array of just social institutions, none of which are specifically punitive. Hence, so far we have not seen that Hegel lends any support to holism. So, if we are going to encounter any evidence in favor of a Hegelian holism, we must extend our examination of Hegel beyond Chapter III’s discussion of what just desert looks like and the core institutions that make it possible (the family, civil society, and the state) to one that takes explicitly punitive background conditions seriously.

It is here that Hegel’s discussion of legal publicity and legal education comes into play. Recall that in Chapter III we mentioned that desert judgments cannot be based on whim (for whim is indicative of abstract not social freedom) but must be shared (i.e., be made universal) and have a principled basis. I did not mention there, however, that the shared and universal component of desert is given a recognized and stable form in the legal code (§219), which, through being made publicly visible, all citizens come to

¹¹⁶ Samuel Scheffler, “Distributive Justice and Economic Desert,” at 81.

know (as opposed to just professional judges) (§§224, 221A,). Furthermore, since the law is publicly visible and all citizens are educated in it, they see it as rational. That is, it is deemed rational because it conforms to the principle of ethical life, the concrete universal, which means it is written so as to take considerations like economic background, intention, and the crime's effects (how much the crime upsets legal stability) into account (§§127, 227, 218A).

At this point we can derive the following holist principle from Hegel: A particular punitive desert judgment is just only when it conforms to a legal code (the background X) and, furthermore, that legal code conforms to the principle of social membership, the concrete universal, which all citizens recognize and identify as rational. This holist principle then fills in and develops Hegel's postjusticial view of desert discussed in Chapter III, according to which just desert is operative only under just social conditions. For now we also know that making just desert judgments requires more than actually obtaining just social conditions. It is further required to consult the legal code, which all social members deem rational.

Like Hampton's holistic principle, I think the Hegelian derived holist principle is attractive because it is strongly intuitive. The intuition it draws upon is that it is simply not enough to hold private desert judgments. Our desert judgments must be principled and stable. Thus, they seem truly legitimate only when all idealized moral agents also share them through a mediated rational structure like a legal code.

C. Concluding Remarks

Scheffler claims that punitive desert, unlike economic desert, is legitimately prejudicial.

Hampton and Hegel each provide strong reasons for rejecting Scheffler's claim.

Hampton shows that desert judgments are morally offensive when they ignore a proportionate distribution of punishment. To say a sexual offender deserves a light sentence is offensive because the distribution of punishment (the background condition) punishes (or is supposed to punish) according to how serious the crime is, or, the principle of proportionality (the standard which makes this condition just). Thus, in order to make a moral desert judgment, it is necessary to consult the prior distribution and model one's judgment after it. Hegel's argument for the necessity of consulting the prior distribution (the legal code in Hegel's case) is somewhat different. He shows that desert judgments must be based off a stable and rational legal code (distribution). A stable legal code is necessary to ensure that particular desert judgments are shared and therefore not contingent. A rational legal code is necessary for social members to reflectively endorse its particular desert judgments; that is, they endorse them because the code to which they belong mirrors the principle of social membership, the concrete universal. It is this last requirement, that all social members reflectively endorse their rational juridical system, which serves as Hegel's justification for the legal code itself (the prior standard which justifies the distribution). The morally attractive upshot to both of these derived holistic principles is that they make intuitive the fusion between the epistemological and the moral: We cannot make an accurate desert judgment unless we

also know (1) that it belongs to a system of some kind, which (2) is in turn deemed either moral (for Hampton) or rational (for Hegel).

CHAPTER V

CONCLUSION

It seems useful to now recap how I arrive at my project's conclusion in favor of punitive holism. Chapter II examined Hampton's retributive theory, which employs both noncomparative and comparative types of justice. I argued that although Hampton provides evidence that proportionate punishment comparatively responds to the victim and wrongdoer, she does not indicate how it noncomparatively restores the victim and wrongdoer. Chapter III begins by observing that, unlike most retributivists, Hampton employs desert as a comparative idea: how much punishment someone deserves depends on how much their crime elevates them above their victim. However, like traditional retributivists, Hampton employs a prejusticial conception of desert, or, the view that desert is meaningful outside of or prior to justice. I spend the rest of the chapter examining Hegel who, like Hampton, thinks punishment performs an expressive function and that desert is essentially comparative. However, in contradistinction to Hampton, Hegel rejects prejusticial desert. Desert is legitimate only after just social conditions obtain and individuals are properly morally educated to have a shared and just understanding of it. I think Hegel's idea of postjusticial desert is attractive because it jibes with the intuition that just societies stabilize and actualize moral concepts. Chapter IV further pursued the idea of what just desert looks like. First, I examined Samuel Scheffler's theory of holism, the view that desert's legitimacy lies in referencing a prior just distribution. I then argued against Scheffler's asymmetrical stance that, unlike economic desert, punitive desert is legitimately prejusticial (where now prejusticial

means non-holist and not simply non-postjusticial) by employing principles derived from Hampton's and Hegel's theories. Hampton's implicit holism is contained in her view that the moral accuracy of desert judgments lies in their referencing the prior just (i.e., proportionate) distribution of punishment. Hegel's implicit holism is contained in his view regarding the publicity and education of law. For Hegel, desert judgments are legitimate only when they are legally codified and when all citizens are educated to recognize the just nature of law (it's just because it conforms the principle of social membership). These derived holistic principles seem intuitively attractive in two ways. First, they fuse the epistemological to the moral: Accurate moral desert judgments must reference a prior punitive distribution scheme, which all citizens deem just. Second, these principles unite deontological and consequentialist intuitions by understanding desert, a characteristically deontological concept, through the distributive scheme (via law's proportionate sentences or law itself) and societal context (via how properly constituted persons view the messages implicit in crime and punishment or the effect crime has on legal stability) in which it's meaning is established and changes.

To further pursue this project would most likely entail arguing for the stronger and much more difficult claim that the major non-holist punitive theories are either ethically misguided or implausible. However, for the purposes of this thesis, I will be content if I have shed light on punitive holism's moral appeal.

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